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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

LAVEDA NOONAN,
Petitioner,

v.

NEW YORK LIFE INSURANCE CO.,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered upon September 24, 1954 and confirmed upon rehearing October 26, 1954, reversing the decree of the District Court of the United States for the District of Oregon rendered upon May 22, 1953.

OPINIONS BELOW

The District Court did not deliver a formal opinion. For the convenience of this Court the trial court's Memorandum of Decision is set out in the appendix to this petition (Appendix A).

The opinion of the Court of Appeals is reported at 215 F. (2d) 905. This decision is also appended hereto (Appendix B).

BASIS OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed, as stated, upon September 24, 1954; petition for rehearing was duly filed upon October 20; and an order denying the petition for rehearing was entered upon October 26.

Application for stay of mandate pending application in this Court for writ of certiorari was made October 26, 1954, and an order staying the mandate until November 30 pending the application for writ of certiorari in this Court was entered October 26. Application for extension of stay of mandate pending application in this Court for writ of certiorari was made November 19, and an order extending the stay of mandate until December 15, was entered November 19, 1954.

Jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

QUESTION PRESENTED FOR REVIEW

The question presented here for determination is important but may be stated very briefly. It is as follows:

1. The insured complied with all the requirements of the life insurance application. These requirements were payment of the first premium in cash and submission to the company, on its own form, of satisfactory evidence of insurability. The company unqualifiedly agreed in this insurance contract application that, upon the completion of the application requirements, the policy, as applied for, would be in effect from the date set out in the body of the application as if the policy had been delivered. The effective date, with the parties' agreement, was backdated to save insurance age. No qualifying language was placed in the application concerning suicide. The insured committed suicide. *Quaere,* what effect, if any, is to be given the unqualified agreement of the parties in the application in regard to the inception of the company's liability?

STATEMENT OF THE CASE

Liability Under the Policy

On May 23, 1952, as a result of business adversities, financial difficulties and the mental strain brought on by overwork and worry, Harold Noonan committed suicide in his parked car among the west hills of Portland, Oregon, by firing a shotgun into himself. He left his wife

LaVeda Noonan, the petitioner herein, and his infant child the financial disaster which was his business and several small insurance policies among which was the policy under consideration, New York Life Insurance Policy 22-054-505 issued for $5000 (R. 48).

As beneficiary under this policy, LaVeda Noonan submitted to the New York Life Insurance Company on July 15, 1952 a claimant's statement and a certified copy of the death certificate. On July 18, 1952, the company rejected the beneficiary's claim and tendered her $266.38, which amount was the three semi-annual premiums insured had paid on the policy plus interest, claiming that the company's contractual liability was thereby discharged by virtue of the terms of the one-year suicide clause in the policy.

Jurisdiction of Court of First Instance

Thereafter LaVeda Noonan, a citizen of the State of Oregon, commenced this suit for the face amount of the policy in the United States District Court for the District of Oregon against the New York Life Insurance Company, a corporation organized and existing under the laws of the State of New York and a citizen of that state.

Jurisdiction of the District Court existed by virtue of the amount in controversy, $5,000, and the diverse citizenship (Section 1332 of Title 28 United States Code).

Contract Provisions

The insured made application for his policy on June 15, 1951 (R. 53), and the application contained, among other things, the following items. Item 18 of the application sets out in bold print "Write policy to take effect" and the (c) portion of that statement reads "as of 3-14-51." Item 25 of the application contains a record that the first semi-annual premium in the amount of $75.15 was paid in cash. The language beginning at the lower left hand corner of the application reads as follows:

> "IT IS MUTUALLY AGREED THAT:
>
> 1. If the applicant shall have paid the soliciting agent in cash, . . . an amount which equals the full first premium for the policy applied for, and if the company shall receive evidence satisfactory to it that at the time of completion of this application the Proposed Insured . . . was an acceptable risk for said policy at the Company's published premium rate therefor, the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above as if it had been delivered."

As required of the insured by this clause, the necessary premium was paid and satisfactory evidence of insurability on appellant's own form (R. 54) was provided.

Item 3 of this portion of the application reads as follows:

> "3. The Applicant's acceptance of any policy issued on this application shall constitute ratification of all representations and agreements made in writing as part of this application and of any amendments and corrections which the Company makes and refers to under item 27 above in connection with issuance of the policy."

There were no items of change or correction, and there were no amendments to the application.

Among the provisions of the life insurance policy were the following (R. 52):

> "In event of suicide within one year from the date of issue of this Policy, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums hereon which have been paid to and received by the Company and no more."

> "This policy and the application therefor, copy of which is attached hereto and made a part hereof, constitute the entire contract."

The first page of this policy contains a reference to the March 14th day set out in the application (R. 48):

> "The anniversaries and insurance years of this Policy shall be determined from March 14, 1951, the date as of which this Policy shall be deemed to have taken effect."

The date of June 22, 1951, is also noted on the first page of the policy and it is set out as follows:

> "In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this Policy to be executed on June 22, 1951, which is its date of issue."

Lower Court's Decisions

The trial court on May 22, 1953, in its memorandum decision held as a matter of law that there was an ambiguity between the terms of the application and the policy and found for the beneficiary (Appendix A).

The Circuit Court of Appeals reversed the District Court, basing their decision on language found in the policy issued to the insured (Appendix B).

ARGUMENT

Case on the Merits

Insured and the company unequivocally agreed on the effective date of the policy in the application signed by the insured and the company's representative. Webster's New International Dictionary, Second Edition Unabridged at page 818 gives this definition for *effect*: "state or fact of being operative". All qualifications placed in the application concerning any portion of this agreement were complied with by the insured.

An examination of the cases involving suicide situations reveals, in a substantial number of these cases, that it now is company practice to set out the restrictions as to suicide and incontestability in the application. It was within the company's power here to reconcile any conflict in the insurance contract by pointing out in its application its suicide or incontestable restrictions.

To what then, if anything, was insured entitled at the time he completed the application, insurance examination, paid his premium and received his binding receipt? Or was he solely at the mercy of the insurance company and what they might place in their policy? If they could without insured's consent qualify the agreement in the application as to the policy's date, could they not then in the policy qualify without insured's consent the amount

of the policy or to whom the policy proceeds would be paid?

It would seem that the Circuit Court of Appeals for the Ninth Circuit should have either given effect to the agreement of the insured and the company in the application and thereby have found that the suicide period had run or should have affirmed the lower court's opinion and found that there was an ambiguity between the terms of the application as agreed upon and the terms of the policy as issued.

As stated by Judge Gardner, specially concurring in the case of Pennsylvania Mutual Life Ins. Company v. Forcier, 103 F. (2d) 166, that where there is an inconsistency in the provisions of an insurance contract, effect should be given to the provision which creates liability.

Reasons for Allowance of the Writ

1. By finding for the life insurance company on these facts the Circuit Court of Appeals for the Ninth Circuit set up a conflict between its decision and the decision of other circuit courts of appeals as to the effect of the agreement between the parties in the contract application on the inception of the company's liability.

In the case of Prudential Insurance Company of America v. King decided by the Circuit Court of Appeals, Eighth Circuit, 101 F. (2d) 990, the application provided that, if the first full premium was paid with the application and provided the application was ap-

proved by the company, the insurance would be effective from the date of the application. The Eighth Circuit found the governing date to be the date both parts of the application was completed and placed the insurance in effect from that date regardless of a different date set out in the policy.

In the case of Pacific Mutual Life Insurance Company of California v. Barton decided by the Circuit Court of Appeals, Fifth Circuit, 50 F. (2d) 362, the application provided that if the first full premium was paid and the company was satisfied as to the applicant's insurability as of the date of the medical examination that the insurance would be effective from the date of the medical examination. The insured died before the insurance policy was received by him but after he had paid the first premium and submitted suitable evidence of insurability. The court found for the beneficiary giving effect to the agreement in the application.

2. By finding for the life insurance company on these facts the Circuit Court of Appeals for the Ninth Circuit set up a conflict between its own decisions as to the effect of the agreement between the parties in the contract application on the inception of the company's liability.

In Schwartz v. Northern Life Insurance Company, 25 F. (2d) 555, the insured in that case committed suicide and the policy incorporated a one year suicide clause. Both the application and the binding receipt in the Schwartz case provided that the insurance would be in force when the full premium was paid in advance in

cash and an examination satisfactory to the company had been made by the medical examiner. Both of these requirements were completed by the insured on August 2, 1924. The ninth circuit gave effect to the agreement in the application saying at p. 558:

> "From a consideration of all the provisions of the contract here in question, we reach the conclusion that the minds of the contracting parties met in fixing August 2, 1924 as the date from which the policy became effective and as the date upon which the risk commenced and the date from which began the year during which the policy might be contestable for suicide."

3. The decision of the Circuit Court of Appeals for the Ninth Circuit is believed to be erroneous and the conflicting decision of the trial court correct. Your petitioner feels that the decision of the ninth circuit under consideration probably conflicts with the decision of this Court in the case of Mutual Life Insurance Company of New York v. Hurni Packing Company, 263 U.S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A.L.R. 102. In that case this Court held that it was competent for the parties to agree that the effective date of he policy should be one prior to its actual execution and that that was what they did. A special provision of the application provided that the applicant by request might have the policy antedated for a period not to exceed six months. This provided for his insurance at the age of forty-seven. Under this agreement the policy was issued as of August 23 and the insurance became effective from its date of issue,

although it was not actually applied for until September 2 and not executed and delivered until September 7. This Court held, in effect, that although not delivered until a later date, the policy went into effect on the date agreed to by the parties as the effective date and not upon the later date upon which it was actually delivered.

The following language is found at 29 Am. Jur., Insurance, § 219:

> "As a general rule, the risk under a policy or contract of insurance attaches as of the time actually agreed upon or understood by the parties. It is competent for the parties to an insurance policy to agree that it shall be antedated, and thereupon it takes effect by relation from the agreed date. Whether the risk begins from a past day depends upon the terms of the contract, and such a provision will be given effect in the absence of anything showing a contrary intention or understanding."

The last sentence is footnoted with the Hurni Packing Company case.

4. Clearly the question presented is of public importance. As of mid year 1953, there were 793 life insurance companies in existence.[1] As of December 31, 1953, the New York Life Insurance Company alone had insurance in force totaling $12,416,338,464.[2]

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[1] Life Insurance Fact Book; 1954 Edition, p. 44; published by the Institute of Life Insurance.

[2] Best Life Insurance Reports; 1954 Edition; p. 818; published by Alfred M. Best Co.

A contract of life insurance is based on the application-policy system. Uniformity and certainty in matters of insurance contracts are necessary since expensive litigation destroys a large part of the possible benefits of the insurance regardless of who is finally successful. Settlement of this question by this Court is plainly in the public interest.

Respectfully submitted,

THOMAS H. RYAN

APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LAVEDA NOONAN, Plaintiff,	)	
vs.	)	Civil No. 6852
NEW YORK LIFE INSURANCE COMPANY, a corporation, Defendant.	)	MEMORANDUM OF DECISION

By conventional canon, the suicide clause of the policy must be read with the application.

The application reads:

> If the Applicant shall have paid the soliciting agent in cash, . . . , an amount which equals the full first premium . . . , and if the Company shall receive evidence satisfactory to it that at the time of completion of this application the Proposed Insured . . . was an acceptable risk for said policy . . . , the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above (3-14-51) as if it had been delivered.
>
> (Date in parenthesis and underlining added)

Can it be denied that the quoted language conflicts with the language of the policy?[1] Construction being necessary, the construction most favorable to the bene-

[1]Suicide Clause:

"In event of suicide within one year from the date of issue of this policy, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums hereon which have been paid to and received by the Company and no more."

ficiary is to be adopted. It follows that judgment will be for plaintiff.

Dated May 5, 1953.

/s/ Claude McColloch
Judge

Defendant's authorities are distinguishable.

C. McC.

[Endorsed]: Filed May 5, 1953.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a Corporation,	)	
Appellant,	)	No. 13,960
vs.	)	
	)	Sep. 24, 1954
LAVEDA NOONAN,	)	
Appellee.	)	

Appeal from the United States District Court for the District of Oregon

BEFORE: HEALY, POPE, and CHAMBERS, Circuit Judges

HEALY, Circuit Judge

This is a suit on a policy of life insurance. The contract contained a clause barring recovery of the principal sum if death by suicide should occur within a year of the issuance of the policy. The insured became a suicide. The trial court, deeming the contract to be ambiguous as regards the date on which the year began to run, resolved the ambiguity in favor of the beneficiary (appellee here) and accordingly gave judgment for the latter. The sole question on the Company's appeal is whether an ambiguity exists in the respect mentioned.

The application for the insurance was executed by the insured on June 15, 1951. For the obvious purpose of giving the insured the benefit of a lower premium rate based on his insurance age, the application asked in item 18 thereof that the policy be written to take effect

March 14, 1951.[1] A further provision of the application reads: "It is mutually agreed that: If the Applicant shall have paid the soliciting agent in cash, . . ., an amount which equals the full first premium . . ., and if the Company shall receive evidence satisfactory to it that at the time of completion of this application the proposed Insured . . . was an acceptable risk for said policy . . ., the policy as applied for shall be deemed to be in effect as from the date specified in item 18 above as if it had been delivered."

In conformity with the application, the policy thereafter issued contained on its first page the following statement: "The anniversaries and insurance years of this Policy shall be determined from March 14, 1951, the date as of which this policy shall be deemed to take effect." Following this provision, and immediately preceding the signatures of the Company's authorized officers appears the clause: "In witness whereof the New York Life Insurance Company has caused this Policy to be executed on June 22, 1951, *which is its date of issue.*" [Emphasis ours.] The suicide provision in question reads: "In event of suicide within one year *from the date of issue of this Policy,* whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums hereon which shall have been paid to and received by the Company and no more." [Emphasis ours.] The incontestabiliity clause, so far as material, reads: "This Policy shall be incontestable after it has been in force during the lifetime of the Insured

[1] The application indicates that the insured became 52 years of age on September 15, 1950.

for one year from *its date of issue* . . . ." [Emphasis ours.]

The insured's death by suicide occurred May 23, 1952. Appellant thereafter tendered to the beneficiary the premiums paid, with interest. The tender was rejected, and the beneficiary brought this suit for recovery of the face amount of the policy. As already indicated, the court, believing the provisions of the policy and the application therefor to be conflicting or ambiguous as to the controlling date, granted judgment for the beneficiary.

We are not able to agree that conflict or ambiguity exists. The entire contract is set out in the policy and the application, which latter was expressly made a part of the contract. Clearly, the policy was in effect from March 14, 1951 for every purpose except the suicide and incontestability provisions. The latter are on their face governed by "the date of issue," which was specifically stated in the policy to be June 22, 1951. The two dates, March 14, 1951, and June 22, 1951, serve entirely different purposes, as is readily ascertainable from a reading of the instrument. The insured's suicide occurred within one year from the specified date of issue, hence applicant's obligation was limited to the return of premiums paid.

A number of authorities are cited by the parties, particularly by appellant, but their citation in this opinion would serve no useful purpose.

Reversed.

(Endorsed:) Opinion. Filed Sep. 24, 1954.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 486

LAVEDA NOONAN,

Petitioner,

v.

NEW YORK LIFE INSURANCE CO., a corporation,

Respondent.

REBUTTAL BRIEF OF PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

QUESTION PRESENTED FOR REVIEW

Petitioner agrees that the rephrased question set out by respondent on page one of its brief is a part of the question of which a review is requested. However, in addition to the suicide clause ambiguity mentioned by respondent, the date from which the incontestable period began under this or a similarly worded insurance con-

tract would be in question here. Also undetermined is the question whether or not any insurance would be in force in this or a similarly worded insurance contract after completion of the insurance application but before receipt of the policy.

Petitioner, therefore, contends that the question here, paraphrasing the language of her petition, is the effect to be given to an unqualified agreement between the parties in an insurance contract application in regard to the inception of the company's contractual liability.

REBUTTAL ARGUMENT

Contract is Policy and Application

Respondent emphasizes in its brief the insurance policy involved here rather than the insurance contract, which contract would include the insurance application and the agreements expressed therein. Respondent's policy form specifically points out that the policy and the application together make up the insurance contract (Petition p. 6).

Conflicts With Other Decisions

Respondent attempts to reconcile the conflict of the instant case with the cases cited by petitioner without considering the principle enunciated in petitioner's case. Petitioner's cases give effect to the agreements set out in the only portion of the insurance contract signed by both parties—the contract application.

In the case of Mutual Life Insurance Company of New York v. Hurni Packing Co., this Court 263 U.S. 167 at 175, 44 S. Ct. 90 at 91, 68 L. Ed. 235 at 239, cited two cases which stand for this principle. These cases were briefed by petitioner in her appellee's brief and in her petition for rehearing addressed to the Court of Appeals for the Ninth Circuit. They are Anderson v. Mutual Life Insurance Co. of New York, 164 Cal. 712, 130 Pac. 726, Ann. Cas. 1914 B, 903, and Harrington v. Mutual Life Insurance Co. of New York, 21 N.D. 447, 34 L.R.A. (N.S.) 373, 131 N.W. 246.

In the Anderson case the insured suicided over a year from the policy date determined by the completion of the parts of the first insurance contract application but less than a year from the date the policy sued upon was "caused to be executed and issued." The suicide clause of the policy ran for "the period of one year after the issuance of this policy." The Supreme Court of California, finding that the parties had agreed that the contract application date was the date the risk attached under the insurance contract, gave effect to this agreement and allowed recovery of the face amount of the policy.

In the Harrington case the insurance contract application was backdated to get the benefit of a lower premium as in the instant case. The insured suicided over a year from the policy date agreed upon in the insurance contract application but less than a year from the date the policy was issued and delivered. The suicide clause in the policy ran for "the period of one year after the issuance of this policy."

One of the two issues decided by the Supreme Court of North Dakota was: "Is the defendant company liable upon a policy of insurance in case of the death of the insured by suicide in less than a year from the time of the issuance of the policy, although an artificial period of more than one year is produced because of the dating back of the policy. . . .?" The Court gave effect to the date back agreement in the insurance contract application and allowed recovery of the face amount of the policy.

In diversity cases under the doctrine of Erie R. R. Co. v. Tompkins, 304 U.S, 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, federal courts sitting in these two jurisdictions would be bound by these decisions. The Court of Appeals for the Ninth Circuit, in whose circuit the Anderson and Harrington cases were decided, would then find itself in opposition to the decisions of the instant case.

Furthermore, the principle of the Anderson case, supra p. 3, has been accepted by the Ninth Circuit in Schwartz v. Northern Life Insurance Co., 25 F. (2d) 555 at 557, where it cited the Anderson case.

Respondent's Cases Distinguishable

Respondent cites two cases which it claims are in conformity with the instant decision of the Court of Appeals for the Ninth Circuit. In the case of Crowley v. Travelers Insurance Co., 196 F. (2d) 315 (Respondent's brief p. 4) both the application for the insurance contract and the policy contained suicide and incontestable clauses whereas in the instant case only the policy con-

tained a suicide clause and an incontestable clause. The Court in the Crowley case could, therefore, reconcile the parts of the life insurance contract.

The case of Davis v. Fidelity Mutual Life Insurance Co., 107 F. (2d) 150 (Respondent's brief p. 5), is distinguishable on the ground that the Court's holding in that case was solely in regard to ambiguities between the terms of the policy. The agreement in the insurance contract application, material in the instant case, was not discussed by that Court.

Respondent, in its brief at the bottom of page five, places the responsibility of correlating the terms of the application and policy, in the instant case, on the insured. It need only be pointed out that where two federal courts, as well as counsel for both parties, differ as to terms of this contract, respondent should scarcely expect a layman to have more ability.

Problem of Public Importance

Your petitioner feels this problem to be a matter of considerable public interest and importance. The future education, future security, future discharge of obligation, taxwise and businesswise, depends today on the certainty of insurance contracts for many thousands of people. Petitioner in aid of maintaining consistency of interpretation in what today is an integral part of our economy and society—life insurance—asks only an opportunity to fully present this question to this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS H. RYAN

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Appellant,*	)	
vs.	)	No. 13,960
LAVEDA NOONAN, *Appellee.*	)	

APPEAL from the United States District Court for the ..... District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the..... judgment of the said District Court in this Cause be, and hereby is reversed.

(ENDORSED) Judgment
Filed and entered September 24, 1954,
PAUL P. O'BRIEN, Clerk.

JAN 3 1955
HAROLD B. WILLEY, C

In the Supreme Court

of the United States

OCTOBER TERM, 1954

No. 486

LAVEDA NOONAN,

Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court

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OCTOBER TERM, 1954

No. 486

LAVEDA NOONAN,

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vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

The question presented for review as stated by petitioner in her petition is not a correct statement of the question. The question presented for review is whether there is any ambiguity in the suicide clause of the policy of insurance in

question, which provides for a limited amount of insurance in the event of suicide within one year from the date of issue of the policy, where other provisions of the policy provide that the policy shall be deemed to be in effect for certain purposes from one date, and the testimonium clause specifically designates another date as its date of issue.

STATEMENT OF THE CASE

The policy in the instant case was issued on June 22, 1951, pursuant to a written application dated June 15, 1951. The insured in his application specified that the policy should be written to take effect "as of 3-14-51". The application provided that if the applicant should pay the agent the amount indicated on the application and the company should receive satisfactory evidence that at the time of the completion of the application the insured was an acceptable risk for the policy at the company's published premium rates therefor, the policy as applied for should be deemed to be in effect as from the date specified.

There was no reference to suicide in the application. However, the policy, when issued contained a provision to the effect that, in the event of suicide within one year from the date of issue of the policy, the insurance under the policy should be a sum equal to the premiums which had been paid to and received by the company and no more.

The policy contained a provision that "the anniversaries, and insurance years of this policy shall be determined from

March 14, 1951, the date as of which this policy shall be deemed to take effect". This was in conformity with the application. Following the foregoing provision and immediately preceding the signature of the company's authorized officers appears this clause:

> "In Witness Whereof, the New York Life Insurance Company has caused this policy to be executed on June 22, 1951, which *is its date of issue.*" (emphasis supplied)

The insured committed suicide on May 23, 1952. Appellant, the beneficiary, submitted proof of death to the company on June 15, 1952. On June 18, 1952, respondent tendered to the appellant a sum equal to the premiums paid, plus interest from the date of death until June 18, 1952. This tender was rejected and this action was commenced by petitioner to recover the face amount of the policy. Respondent tendered into the court for the benefit of petitioner the amount of its previous tender.

The trial court expressed the opinion that the language of the application conflicted with the language of the policy and gave judgment for the petitioner. The Court of Appeals, however, held that no conflict or ambiguity existed; that clearly the policy was in effect from March 14, 1951, for every purpose except the suicide and incontestability provisions; that the latter are on their face governed by "the date of issue" which was specifically stated in the policy to be June 22, 1951. The Court of Appeals therefore reversed the decision of the trial court.

ARGUMENT

I. There is No Conflict with Decision of Another Court of Appeals.

The decision of the Court of Appeals for the Ninth Circuit is not in conflict with the decision of another court of appeals. The cases cited by petitioner do not reflect such a conflict. *Prudential Insurance Company of America vs. King*, 101 F. (2d) 990 involved a question as to the effective date of a policy where the application contained two different dates. The question for determination was whether the policy was in effect on the date of death of the insured. The case of *Pacific Mutual Life Insurance Company of California vs. Barton*, 50 F. (2d) 362, involved a question as to whether two policies of insurance were in force at the time of the insured's death and turned on the question of the authority of the soliciting agent. In neither of these cases is the question of suicide involved, nor do they involve the question of the date of issue of a policy.

The decision of the Court of Appeals for the Ninth Circuit in the instant case is in conformity with the decision of the Court of Appeals for the Fifth Circuit in the case of *Crowley v. Travelers Insurance Co.*, 196 F. (2d) 315. In that case the policy contained provisions similar to those in the instant case. There the Court held that there was no conflict nor ambiguity in the suicide provisions of the application and the policy; that in both provisions the issue date is named as controlling; and that this being so, the rule of more favorable

construction in favor of assured invoked by appellant is without application.

The decision is also in conformity with the decision of the Court of Appeals for the Fourth Circuit in the case of *Davis v. Fidelity Mutual Life Insurance Co.* 107 F. (2d) 150. The policy in that case likewise contained provisions similar to the policy in the instant case and the court held that there was no ambiguity and that "the policy expressly states that the 27th day of March, 1936, is the 'date of issue' and while February 27, 1936, is fixed in the policy for certain purposes, this was done at the request of the insured and was for his benefit. These purposes are expressly stated and the earlier date was to be used as the anniversary date for the payment of premiums, loan provisions, non-forfeiture provisions and the apportionment of dividends. . . . Having contracted that the 'date of issue' was March 27, 1936, the death of the insured by his own hand on March 16, 1938, brought into force this clause." This case also held that insurance companies have a right to make a lawful contract and have that contract enforced, and that the insured, when he accepts the policy, is charged with the knowledge of its provisions. This is an answer to the argument made by petitioner that perhaps the insured was wholly at the mercy of the company as to what it might place in the policy. If the contract when received did not conform to his application, it was the duty of the insured to refuse to accept it or be bound by its terms.

II. There is No Conflict with Prior Decision of Court of Appeals for Ninth Circuit.

The decision in *Schwartz vs. Northern Life Insurance Company*, 25 F. (2d) 555, (CCA 9th Cir.) is not in conflict with the decision in the instant case. It is true that the Schwartz case involves the question of suicide and whether or not the insured committed suicide within the period prescribed by the suicide clause of the policy. However, the application in that case contained a provision that the insurance should be void, except for the amount of the premiums paid therefor, in the event that the insured committed suicide within one year "from date policy becomes effective." The question there was what was the effective date of the policy and not the date of issue of the policy as in the instant case. Neither did the policy in that case contain a provision specifically designating the effective date of the policy.

III. There is No Conflict with Prior Decision of This Court.

The decision in the instant case is not in conflict with the decision of this court in *Mutual Life Insurance Company of New York vs. Hurni Packing Company*, 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 ALR 102. In the Hurni Packing Company case the application requested that the policy be dated August 23, 1915. The testimonium clause in the policy read:

> "In witness whereof, the company has caused this policy to be executed this 23rd day of August, 1915."

The policy contained a provision that it would be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue. The policy was applied for on September 2, 1915, and was delivered about September 13, 1915. The question before the Court was the date of issue of the policy. There was no provision in the policy specifically fixing the date of issue as in the instant case. In the Hurni Packing Company case, the court held that the date in the testimonium clause was the date of issue. In the instant case, the Court of Appeals also held that the date in the testimonium clause was the date of issue, particularly because the clause so designated that date as the date of issue.

IV. Public Importance of Decision.

It is recognized that the amount of insurance in force in this country is of importance. However, the precise question presented by the Petition in the instant case is not of sufficient public importance as would warrant this court to accept jurisdiction.

CONCLUSION

There has been no showing by petitioner that there is any conflict between the decision in the instant case and the decision of another court of appeals or of this court on the same matter. Neither is there any showing that the decision is in conflict with the decision of the courts of the

State of Oregon where the policy was delivered. As held by the Court of Appeals, there was no conflict or ambiguity in the policy. The date of issue was specifically stated in the policy in such a manner as to leave no doubt as to the date of issue. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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